is to preserve rights previously acquired, not to create new ones. *Emmons* v. *Harding,* 162 Ind. 154, 160; *Lindsay* v. *Cooper,* 94 Ala. 170. The argument on the part of the prosecution, followed to its logical conclusion, comes to this: "The state as the injured party is not entitled to maintain this prosecution because the money alleged to have been converted was the money of the insurance companies. However, to secure the auditor's punishment, the state has the right to invoke the interposition of estoppel to exclude proof of a fact that would establish the defendant's innocence of the particular crime for which he is being tried." But, the true rule was stated by HADLEY, J., in the principal case, "an offense not within the words cannot be adjudged a crime because within the reason or spirit, and this principle cannot be evaded by holding that one performing acts which are denounced as a crime when committed by a certain class of people, is estopped from denying that he is within that class." *Moore* v. *State,* 53 Neb. 831, 74 N. W. 319; *State* v. *Bailey,* 57 Neb. 204, 77 N. W. 654. R. L. B.

WHEN A DISCHARGED TEACHER MAY RESORT TO THE COURTS.—The plaintiff entered into a contract with the defendant school district whereby he was employed to teach a school for a period of nine months. Before a third of the term had expired he was discharged. The defendant contended that an appeal to the county superintendent, and from his decision to the state superintendent, were conditions precedent to the right to maintain an action upon the contract, and since the appeal was not made plaintiff could not recover. *Held,* that the appeal was a condition precedent and, therefore, the plaintiff was not entitled to recover. *Van Dyke* v. *School Dist. No. 77 of Lewis County* (1906), — Wash. —, 86 Pac. Rep. 402.

Ballinger's Ann. Codes & St., § 2318, declares that "any person aggrieved by any decision * * * of the board of directors may, within thirty days after the decision * * * appeal therefrom to the county superintendent * * * ." The court held that "may" as here used should be construed in a mandatory sense. In support of this view is cited 20 AM. & ENG. ENCY. LAW (2nd Ed.) 237. The writer can find no authority for such an interpretation. On the contrary it is said that "may" cannot be construed in a mandatory sense except to give effect to the clear intention of the legislature; and if there is nothing in the provision to require an unusual interpretation its use is merely permissive. There seems to be no provision in this statute to require any other than the customary meaning. But on page 238 of the above reference are the following words, "where a statute requires that an individual or individuals may do a certain act or have a certain remedy which is intended for his or their own benefit, he or they will have a discretion to do the act or pursue the remedy or to refrain therefrom." This seems to cover the principal case. The statute is permissive and for the benefit of those aggrieved. Here no public interests or rights are concerned and therefore the statute in regard to appeals is optional. "The words shall or may when used in a statute, are imperative only when the public interests and rights are concerned; but when a statute declares that an individual or individuals shall or may do a certain act, or have a certain remedy, which is intended

for his or their own benefit, he or they have a discretion to do the act, or pursue the remedy, or not." *Malcom* v. *Rogers,* 5 Cow. (N. Y.) 188. In the principal case the public have no direct interest, neither have third persons a vested right. The statute is permissive and not compulsory. *Amason et al.* v. *Nash,* 24 Ala. 281.

In support of the decision are cited several Iowa cases based on a similar statute. Two of these seem to be somewhat contradictory. In *Kirkpatrick* v. *School District,* 53 Ia. 585, the court held that if the teacher were discharged he must appeal even though he was not given a hearing before the board as provided in the code. In *Burkhead* v. *School District,* 107 Ia. 29, the court said, "But when a teacher is discharged without the hearing contemplated, the act is wrongful, and resort may be had to the courts; in other words, in order to discharge a teacher, the board of directors must pursue the method prescribed by statute." Certainly if it is permissive in one case it ought to be in the other.

The decision in the principle case is directly contrary to *School Dist.* v. *Hale,* 15 Colo. 367. The question at issue in that case was whether the plaintiff had to show a compliance with the General Statutes providing for an appeal, within thirty days, to the county superintendent in case he was aggrieved by the action of the board of directors. The court in a very able decision held that such compliance was unnecessary. One of the defenses set up was that the act of the legislature ousted the court of its jurisdiction. With reference to this the court said: "Our whole judicial system is at variance with the idea that in the absence of specific, mandatory legislative restriction, the court may not be appealed to, to determine the rights of contract between citizens, or between citizens and corporate bodies which the statutes have created." The inference to be drawn from the principal case is that both the county and state superintendents have judicial powers, but have no remedy to enforce their decrees. That is to say, after a teacher has obtained a decision in his or her favor from the superintendent of public instruction it then becomes necessary to go into the courts to enforce that decree. "This is to require the plaintiff to take two useless, ineffectual, and expensive steps before he resorts to the only tribunal which can afford him relief." Surely it was not the intention of the legislature to make such a law. Further, according to the tenor of the statute it would be necessary for every person aggrieved by the action of the board to take such steps. This would include janitors, mechanics, and many others who have more or less business dealings with the board. In fact, the time would soon come when the total business of the county and state superintendent would be the hearing of such complaints. This is the view of the dissenting judges in the principal case. They also contend that the court has overruled many of its own decisions which support the Colorado case above cited. In those cases, although the appeal question was not mentioned, the court acquiesced in actions on contracts brought in the court without first making the appeal. *Kennedy* v. *School District,* 20 Wash. 399; *Trumbull* v. *School Dist.,* 22 Wash. 631; *Taylor* v. *School Dist.,* 16 Wash. 365. I. E. C.